

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 158 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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THAKOR JAMASHERKHANJI TAJKHANJI

Versus

RAJGOR G.V. DECEASED BY HEIRS VINODRAI GANPATRAM RAJGOR

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Appearance:

MR VC DESAI for Petitioners  
MR SH SANJANWALA for Respondent No. 1  
GOVERNMENT PLEADER for Respondent No. 2  
SERVED for Respondent No. 5

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 12/02/98

ORAL JUDGEMENT

1. In this Second Appeal the following substantial question of law was formulated :

Whether the Appeal in District Court was maintainable at the instance of a third party ?

2. The brief facts are that the present appellants of this Second Appeal were respondents No.1 & 2 in the First Appeal. The First Appeal was filed by Rajgor Ganpatram Vallabhram, a third party who was not a party in the trial Court.

3. The plaintiffs filed a Suit for declaration that they are the owners of 1 Acre - 30 gunthas of land and that the Government or the Gram Panchayat is not its owner. Further declaration was sought that Mamlatdar, holding inquiry under Section 37 of the Bombay Land Revenue Code has no jurisdiction to go ahead with the inquiry. Another relief was that the construction allegedly made by the Panchayat or the Government over the disputed land be demolished and the last relief was in the nature of permanent injunction restraining the defendant from interfering with the possession of the plaintiffs over the land in dispute.

4. The trial Court decreed the Suit and granted declaration that the plaintiffs are the owners of disputed land at Sr.No.1084 admeasuring 1 Acre - 30 gunthas. The Decree for demolition was also granted so also permanent injunction.

5. No Appeal was preferred by the defendants in the case. The First Appeal on the other hand was preferred by Rajgor Ganpatram who was not the defendant before the trial Court. He challenged the Judgment and decree of the trial Court on the ground that he was vitally interested and affected with the Judgment and Decree of the trial Court. He sought leave of the Appellate Court to prefer the Appeal and the Appellate Court granted permission with reasoned order. That order has been challenged in this Second Appeal on the ground that the third party has no right to prefer Appeal. Hence this is the only question of law which is to be answered in this Second Appeal.

6. So far as provisions in the Code of Civil Procedure for filing Appeals are concerned it is nowhere provided specifically that third party should not prefer an Appeal, but the normal practice is that the persons against whom a decree is passed by the trial Court can prefer an Appeal in the first Appellate Court. There is Procedure for filing Appeal by third party. However, various decisions from time to time have ruled that third party can also file Appeal provided two essential conditions are satisfied. The first is that such third party is going to be vitally and adversely affected by

the Judgment and Decree of the trial Court and such party has interest in the property which was the subject matter of the Suit. Merely by showing that a party has interest in the property in Suit or that his interest is going to be adversely affected he can not, as of right, file Appeal. Another exercise has to be undertaken by him, viz. he has to apply for leave of the Appellate Court for permitting him to file Appeal. So in effect this is second condition, viz. the appeal by third party can be filed only with the leave of the Appellate Court.

7. Next question arise is what should be the guideline for the Appellate Court to exercise discretion in permitting such party to file an appeal. Of course the discretion is to be exercised judicially on sound reasoning and well established principles of law. The discretion is not to be exercised arbitrarily or unreasonably. The discretion which is exercised arbitrarily or unreasonably is liable to be interfered with.

8. In the case before me both the ingredients are fulfilled. The appellant in the first Appellate Court had established that he had right in the property in suit. It is not the case where the appellant in the first Appellate Court was all together a third party and abruptly preferred to file first appeal. When the suit was filed in the trial Court he was not impleaded as defendant. During the pendency of the Suit the State Government, Gram Panchayat as well as several villagers claiming interest in the suit property applied for being impleaded as defendants. Rajgor Ganpatram was also one of the applicant before the trial Court. However, the trial Court allowed the application of the Gram Panchayat and the State Government and they were ordered to be impleaded as defendants. The application of Rajgor Ganpatram and other villagers was rejected by the trial Court. There also Rajgor Ganpatram tried to show his interest in the Suit property. The interest in the suit property was clarified before the first Appellate Court. No personal right was claimed. It was claimed that the land in suit was a land of public utility. A Tube-well was there from which the appellant Rajgor Ganpatram and other villagers were drawing water for their use. There is also a school over the land in suit from which children of the villagers are benefitted by receiving education. Since the trial Court granted declaration that plaintiffs viz. the appellant of the Second Appeal are the owners of the land in suit, naturally its consequences would be that the appellant in the first Appellate Court was going to be adversely affected in

claiming his right of public utility of the land in suit. Consequently it can be said that the first condition was fulfilled by Rajgor Ganpatram .

9. He applied for leave of the appellate Court and the appellate Court exercised discretion in his favour by giving cogent reasons and also by referring to various cases cited in the Judgment which need not be reproduced in this Judgment. The order of the lower Appellate Court granting permission to Rajgor Ganpatram to file first Appeal is based on sound reasoning and the discretion has been exercised judicially after applying its mind to the contention raised by the third party appellant before the lower Appellate Court. Consequently that order and finding of the lower Appellate Court on Point No.1 requires no interference.

10. I do not find force in the contention of the learned Counsel for the appellant that the plea of jurisdiction could be raised only by the Government and the panchayat and not by third party. If third party has right to file Appeal it has right to challenge the Judgment and Decree of the trial Court on all possible grounds including lack of jurisdiction of the Mamlatdar before whom inquiry is pending regarding claim to the same land under Section 37 of the Bombay Land Revenue Code. The analogy given by the learned Counsel for the appellant on Section 80 of the Code of Civil Procedure cannot be applied to this case. Of course the plea that the suit is barred for want of notice under Section 80 C.P.C. can be raised only by the Government and not by private individual. The reason is specific provision under Section 80 C.P.C. that no suit against the Government or a public officer can be filed without serving prior notice under the aforesaid section, but here the contention of the third party appellant in the lower Appellate Court was that since the claim is already under inquiry before the Mamlatdar, in view of Section 11 of the Bombay Revenue Jurisdiction Act unless all remedies are exhausted the suit could not be filed. The learned Counsel for the appellant referred to Section 37 Sub-clause : 3 as well as sub-clause : 2. Careful reading of these two provisions coupled with the facts of the case will indicate that under the orders of Gujarat Revenue Tribunal Suit No.21/59 under Section 37, Sub-clause 2 of the Bombay Land Revenue Code has been remanded to the Mamlatdar for fresh inquiry and the same is pending. As such under sub.section 3 of Section 37 the aforesaid suit could be instituted in Civil Court after expiration of one year from the date of any order passed under Sub.Section 1 or 2 or if one or more appeals

have been made against such order within the period of limitation then from the date of any order passed by the final authority, shall be dismissed if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order. Provided that in the case of an order under Sub.Sec.2 the plaintiff has had notice of such order.

11. This shows that Section 11 of the Bombay Revenue Jurisdiction Act makes it clear that a suit before the Civil Court is certainly pre-mature and cannot be filed unless all the remedies provided in the Bombay Land Revenue Code and Bombay Revenue Jurisdiction Act are exhausted. The Suit can be filed within a period of one year after exhausting finally all the remedies under the aforesaid statute. The view of the trial Court that the suit was not pre-mature is therefore erroneous and the view taken by the lower Appellate Court that the suit is premature is perfectly legal and justified. If this is so then the question of law is answered in the way that on the facts and circumstances of the case the third party had right in the lower Appellate Court to file first Appeal and the first Appellate Court was justified in holding that the suit of the plaintiffs appellant was pre-mature. If the Suit was pre-mature it was rightly dismissed.

12. however, the learned Counsel for the appellant expressed an anxiety that if the suit was pre-mature it should have been dismissed without expressing any opinion on the merits or de-merits of the claim of the plaintiffs-appellants. He wanted a clarification in Second Appeal that in so far as the observation of the first Appellate Court regarding merits of the case is concerned it should not come in the way of inquiry under Section 37, Sub-clause 2 of the Bombay Land Revenue Code pending before the Mamlatdar. I am in agreement with this contention. The lower Appellate Court was not justified in touching the merits of the case once it found that the suit was pre-mature. On this finding the suit should have been dismissed without entering into the merits of the case. Thus, though the appeal fails yet a clarification is needed that the observation made by the first appellate Court regarding merits or de-merits of the plaintiffs claim or the case shall not in any way bind the Mamlatdar in the inquiry pending before him nor he will be swayed away by the aforesaid observation. The Mamlatdar will be free to take independent decision from the material and evidence before him.

13. With the above observation the Appeal is

dismissed. No order as to costs.

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